

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* PAUL R. BERGQUIST,  
SHAUNA M. LAGATOL,  
JESUS A. URBAEZ,  
DAVID R. WILLIAMS,  
GREGORY A. GRISSETT  
AND FILOMENA A. MACEDO

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Appeal 2007-2138  
Application 10/645,885  
Technology Center 1700

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Decided: October 31, 2007

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Before BRADLEY R. GARRIS, THOMAS A WALTZ, and  
JEFFREY T. SMITH, *Administrative Patent Judges*.

GARRIS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from the Examiner's decision rejecting claims 1, 3, 4, and 7-22. We have jurisdiction under 35 U.S.C. § 6. We REVERSE.

Appellants claim a non-woven hydroentangled textile with a central area of low basis weight surrounded on both sides by areas of higher basis weight formed of synthetic fibers, the textile having an Air Permeability ranging from 300 to 1000.

Representative claim 1 reads as follows:

1. A non-woven hydroentangled textile formed in cross-section with a central area of low basis weight surrounded on both sides by areas of higher basis weight, the areas of higher basis weight being formed of fibers consisting of synthetic fibers, the textile having an Air Permeability ranging from 300 to 1000 and being incapable of separation in multiple layers after formation without destruction of the textile.

The references set forth below are relied upon by the Examiner as evidence of obviousness:

Suskind ('320)	EP 0308320	Mar. 22, 1989
Suskind ('467)	4,808,467	Feb. 28, 1989
Wagner	5,951,991	Sep. 14, 1999
Bouchette	6,110,848	Aug. 29, 2000
Bergquist	6,723,330 B2	Apr. 20, 2004

Claims 1, 3, 4 and 7-18 are rejected under the first paragraph of 35 U.S.C. § 112 as failing to comply with the written description requirement.<sup>1</sup>

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<sup>1</sup> We observe that the Examiner's theory for this rejection is not applicable to rejected claims 13 and 15 but is applicable to nonrejected claims 20 and 21. These inconsistencies are harmless in light of our disposition of the § 112

Under 35 U.S.C. § 103 (a): claims 1, 3, 4, 13-15, 17, and 19-22 are rejected as being unpatentable over Suskind<sup>2</sup> in view of Bouchette;<sup>3</sup> claims 7-9, 12, 16, and 18 are rejected over these references and further in view of Wagner; and claims 10 and 11 are rejected over the aforementioned references and further in view of Bergquist.

We cannot sustain any of these rejections.

#### THE § 112, FIRST PARAGRAPH, REJECTION

The Examiner believes the here rejected claims offend the written description requirement because "the Specification provides support for polypropylene fibers and not for 'synthetic fibers' [as recited by independent claims 1 and 7]" (Ans. 3). We do not agree.

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rejection.

<sup>2</sup> In discussing the obviousness rejections, both the Appellants and the Examiner refer to the disclosure in US Patent 4,808,467 to Suskind (i.e., rather than EP 0308320 to Suskind). We shall do likewise.

<sup>3</sup> In the paragraph bridging pages 10 and 11 of the Answer, the Examiner relies upon a nonapplied reference (i.e., U.S. Patent 6, 428,799) as evidence supporting an obviousness conclusion regarding the Air Permeability feature of the independent claims. The Examiner's reliance on this nonapplied reference is entirely inappropriate. *See In re Hoch*, 428 F.2d 1341, 1342 n.3 (CCPA 1970). Also see the Manual of Patenting Examining Procedure (MPEP) § 706.02(j)(Rev. 5, Aug. 2006). Therefore, we have not considered this nonapplied reference in assessing the issue of obviousness raised by this appeal.

The test for written description compliance is whether the original specification disclosure conveys with reasonable clarity to those skilled in the art that an applicant, as of the filing date sought, was in possession of the claimed invention. *Vas-Cath, Inc. v. Mahurkar*, 935 F.2d 1555, 1562 (Fed. Cir. 1991).

Here, the higher basis weight areas of Appellants' non-woven textile is disclosed as being formed of fibers broadly and, by example, of polypropylene fibers specifically (Spec. 7, ¶ 00017). This exemplificative reference to polypropylene fiber, which is a synthetic fiber, would have conveyed to an artisan that other synthetic fibers were part of the invention possessed by Appellants as of the application filing date. For this reason alone, we cannot sustain the § 112, first paragraph, rejection of claims 1, 3, 4, and 17-18 as failing to comply with the written description requirement.

#### THE § 103 REJECTIONS

The Examiner finds that Example 4 of Suskind discloses a textile having a central area of low basis weight surrounded on both sides by areas of higher basis weight as required by the appealed claims (Ans. 4). The Examiner acknowledges that the higher basis weight fibers of Suskind's Example 4 fabric include wood pulp fibers and thus do not consist of synthetic fibers as required by the independent claims (*id.*). According to the Examiner, "[i]t would have been obvious ... to a person having ordinary skill in the art to modify the areas of higher basis weight of Suskind which form the outside surfaces of the material and substitute the wood pulp

material with synthetic fibers with the motivation of maximize [sic] the desirable hand feel associated with synthetic compared to wood pulp as disclosed by Bouchette" (*id.* at 5).

The Examiner also acknowledges that Suskind contains no express teaching of Air Permeability values within the Appellants' claimed range but urges that such values either are "inherent to textile formed from the combination of Suskind ... and Bouchette" (*id.*) or "would have been obvious" (*id.* at 6).

In order to satisfy the higher basis weight and synthetic fibers requirements of the appealed claims, the Examiner's proposed combination of Suskind and Bouchette must substitute the synthetic fibers of Bouchette for the wood pulp fibers in the outer webs of Suskind's Example 4 fabric while maintaining the higher basis weight characteristic of these outer webs. However, even assuming an artisan would have replaced Suskind's wood pulp fibers with synthetic fibers, the Examiner has proffered no reason why the artisan would have effected this replacement while also maintaining the aforementioned higher basis weight characteristic of Suskind's outer webs. In this latter regard, we find no disclosure in Suskind which identifies this characteristic as desirable or as serving any particular purpose. Stated differently, it appears that the higher basis weight characteristic of the outer webs in Example 4 is simply the non-consequential result of using outer webs which contain wood pulp fibers.

As for the Appellants' claimed Air Permeability values, the Examiner has provided no support for his belief that such values would be inherently

produced by replacing Suskind's wood pulp fibers with Bouchette's synthetic fibers (Ans. 5). That is, the Examiner has provided no basis in fact or scientific reasoning as support for the belief that use of the fiber materials under consideration will necessarily and inevitably result in Air Permeability values ranging from 300 to 1000 as required by the independent claims on appeal. *See Ex parte Levy*, 17 USPQ2d 1461, 1463-64 (BPAI 1990)(if relying on theory of inherency, Examiner must provide basis in fact and/or technical reasoning to support determination that allegedly inherent characteristic necessarily flows from teachings of applied prior art). To the contrary, comparative examples in Appellants' Specification reveal that textiles formed of these fiber materials may have Air Permeabilities below, as well as in, the here claimed range (Spec. 12).

Moreover, we cannot agree with the Examiner's conclusion that Appellants' claimed Air Permeability values would have been obvious based on the optimization of a result effective variable (Ans. 10-11). This is because the Air Permeability of Suskind's Example 4 fabric is disclosed as 148 (Table III) which is far below the minimum Air Permeability of the appealed claims. These circumstances favor a conclusion of nonobviousness rather than obviousness. *See In re Sebek*, 465 F.2d 904, 907 (CCPA 1972).

In light of the foregoing, we cannot sustain the Examiner's § 103 rejection of claims 1, 3, 4, 13-15, 17, and 19-22 as being unpatentable over Suskind in view of Bouchette. We also cannot sustain the corresponding rejections of the remaining claims on appeal as unpatentable over the aforementioned prior art and further in view of Wagner and Bergquist since

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these last mentioned references are not relied upon by the Examiner for supplying the above discussed deficiencies of Suskind and Bouchette.

#### CONCLUSION

The decision of the Examiner is reversed.

REVERSED

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